Supreme Court, U.S.
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No. 97-124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID KEENE LEAVITT,

Petitioner,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Appeals Of West Virginia

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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1. Respondent "takes exception" with petitioner's statement of facts (Opp. 1), and proceeds to provide the Court with a 14-page recitation of his view of the underlying events in this case. But respondent's rather fanciful story is irrelevant to this Court's consideration of the petition. The relevant facts are not in dispute. Petitioner, an attorney, helped to place Anne Conaty's baby for adoption in California. Respondent, the father of the baby, sued petitioner and members of the Conaty family in West Virginia, where the trial court determined that it had personal jurisdiction over petitioner. The jury awarded respondent $2 million in compensatory damages and $5 million in punitive dam-

ages. And the Supreme Court of Appeals dismissed petitioner's appeal on the sole ground that he failed to post a multimillion-dollar "appeal bond" even though the judgment against petitioner was never stayed and respondent is actively attempting to execute against it.[1]

2. Petitioner demonstrated that the Supreme Court of Appeals' "appeal bond" requirement is irreconcilable with several lines of this Court's constitutional jurisprudence. Pet. 8-24. Respondent casts no doubt on the need for review by this Court of that requirement.

a. The uniform rule in American jurisprudence is that an appellant's failure to post a bond "is no ground for dismissing the appeal." *Hudgins v. Kemp*, 59 U.S. 530, 535 (1856); *see* Pet. 9-10 & n.3 (citing authorities). Respondent contends that "[p]etitioner's argument that the West Virginia bond requirement violates well-established procedural norms is contradicted by the cases he cites." Opp. 17. Respondent does not, however, actually address any of the numerous cases cited by petitioner holding that an appeal cannot be dismissed for failure to post a bond, nor does respondent explain how any of those cases contradict the universally accepted principle that "[f]ailure to file such a

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[1] The West Virginia Supreme Court of Appeals' decision to dismiss petitioner's appeal, after all briefing was completed and oral argument had been held, raises the inference that the court intends to reverse the judgment on the merits. That inference was reinforced recently when the court completed its term without issuing an opinion in the Conatys' appeal, contrary to its normal practice of resolving all cases before the summer recess. If the West Virginia court intended to affirm the judgment in this case, there would be no reason for it to delay issuing its opinion, nor would there have been any reason for the court to dismiss petitioner's appeal.

bond is not grounds for dismissal of the appeal." 5 Am. Jur. 2d *Appellate Review* § 442 (1995).

Respondent relies on a single district court case for the proposition that the filing of a bond securing the judgment may be made the prerequisite to an appeal. Opp. 18 (citing *Patterson v. Warner*, 371 F. Supp. 1362, 1364 (S.D. W. Va. 1972)).[2] Although one would not know it from reading respondent's brief, this Court noted probable jurisdiction in *Patterson* because the validity of the West Virginia appeal bond requirement at issue in that case "appeared to present a significant issue, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Patterson v. Warner*, 415 U.S. 303, 303 (1974) (per curiam). The Court did not reach the merits of the constitutional question, however, because an intervening state-court decision deprived it of any continuing importance. *See* Pet. 19 n.8. There is no similar bar to review in this case.

It therefore remains undisputed that the Supreme Court of Appeals, by dismissing petitioner's appeal from a fully executable judgment for failure to post a

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[2] Respondent also cites (Opp. 18 n.9) an unpublished decision in which the Fourth Circuit observed that "a general bond requirement for civil appeals is not unconstitutional." *Scott v. Morrison*, 995 F.2d 1064 (4th Cir. 1993) (Table). The court of appeals was considering Virginia's requirement that an appellant post security for *costs* before prosecuting an appeal. Va. Code § 8.01-676.1.A. As petitioner has previously noted, West Virginia has a similar requirement. Pet. 14-15. Such cost bonds are entirely distinct from a requirement that a litigant post a bond to secure the judgment, which is required only if the appellant seeks to stay execution of the judgment. *See* Va. Code § 8.01-676.1.C ("An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall file an appeal bond").

bond, was a radical departure from long-settled American practice. Accordingly, the familiar three-factor inquiry established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), should be applied to determine whether that deviation was unconstitutional.

With respect to the first *Mathews* factor, respondent does not dispute that petitioner's private interest in having his appeal considered on the merits is tremendous. *See* Opp. 19; Pet. 12.

As to the second *Mathews* factor, respondent contends that "the risk of an erroneous deprivation of petitioner's property is nonexistent as the requirement that security be posted only guarantees that the security posted would be paid should the judgment be affirmed." Opp. 19. Petitioner does not contend, however, that the Supreme Court of Appeals' "appeal bond" requirement creates a risk that he will be erroneously deprived of the amount of the bond. Rather, the imposition of such a requirement as a prerequisite to obtaining appellate review creates an impermissible risk that he will be erroneously deprived of the property that is the subject of the judgment. As this Court has explained, "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).[3] That risk is intensified when a state refuses to provide appellate review to a particular class of litigants.

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[3] Respondent states that "nothing in *Honda* . . . requires a court to disregard otherwise constitutional appellate procedures in order to review a punitive damages award." Opp. 19 n.10. That assertion begs the question whether the "appeal bond" requirement is, in fact, "otherwise constitutional." Because it is not, petitioner is entitled to the appellate review of the punitive damages award against him that this Court found constitutionally significant in *Honda*. *See* 512 U.S. at 420-21; Pet. 13.

Respondent places heavy reliance on the third *Mathews* factor, arguing that "the state's interests in guarding a damage award already made" justify the "appeal bond" requirement. Opp. 19 (internal punctuation omitted). Respondent bases this argument on this Court's observation that "reasonable procedural provisions to safeguard litigated property" may be constitutionally permissible. *Lindsey v. Normet*, 405 U.S. 56, 78 (1972).[4] As petitioner has previously explained, however, West Virginia has no legitimate interest in "safeguarding" any property over which it has no jurisdiction. *See* Pet. 17. Respondent does not even attempt to dispute the correctness of this argument.

Respondent's failure to recognize that state courts may act only within their jurisdiction also leads respondent to contend, mistakenly, that this Court's decision in *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954), compels the conclusion that West Virginia's "appeal bond" requirement is constitutional. Opp. 15-16. In *National Union*, the state trial court had ordered a litigant to transfer certain assets to a receiver in the forum state. The court had jurisdiction over those assets because the litigant was a multi-state association, and the litigant's refusal to comply with the court's lawful order was held to be sufficient reason to dismiss the appeal. Here, by contrast, the courts of West Virginia have no jurisdiction over any of petitioner's assets. No decision of this Court has considered, much less authorized, the dis-

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[4] The *Lindsey* Court emphasized that such procedures must be "uniformly and nondiscriminatorily applied." 405 U.S. at 78. As petitioner apparently is the only litigant in the history of West Virginia jurisprudence to suffer dismissal of his appeal for failure to post a bond to secure an executable judgment, that requirement manifestly has not been met.

missal of an appeal for failing to make assets over which a state court has no jurisdiction available to the prevailing party. Under those circumstances, a state court may not constitutionally attempt to extend its jurisdiction beyond its borders through the use of a bonding requirement or otherwise.

b. Petitioner has previously explained that the Supreme Court of Appeals' "appeal bond" requirement cannot be reconciled with this Court's decision in *Lindsey*. Pet. 15-18. Respondent seizes exclusively on a snippet from *Lindsey* that, as just discussed, is inapposite in these circumstances. *See* Opp. 16. Respondent entirely ignores the *holding* of *Lindsey*, which compels the conclusion that the "appeal bond" requirement is unconstitutional. Moreover, respondent does not even mention, much less distinguish, the numerous post-*Lindsey* decisions in the lower courts invalidating bond requirements on constitutional grounds that conflict with the decision below. *See* Pet. 18-19 n.8.

c. A consistent line of precedent, including this Court's recent decision in *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996), squarely holds that the States cannot place financial obstacles in the path of litigants seeking appellate review. *See* Pet. 19-21. Respondent does not even attempt to address any of those decisions. Instead, respondent contends that the "appeal bond" requirement did not violate petitioner's right of access to the courts because "[p]etitioner had access to the appellate process. However, as a condition to that access, he was required to post security." Opp. 19. Respondent makes no effort, however, to explain how this *ipse dixit* can be reconciled with the constitutional principle that "no person can be denied access to [the] courts, either for a trial or an appeal, because he cannot . . . finance a bond." *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, 955 (1971) (opinion of Black,

J., respecting the denial of certiorari). The Supreme Court of Appeals of West Virginia deprived petitioner of his constitutionally guaranteed right of access to the courts by making his appeal contingent on the posting of a bond the court (and respondent) knew petitioner could not afford.

d. Petitioner, the only out-of-state defendant in this case, was the only party required to post an "appeal bond" as a precondition to having his appeal considered by the Supreme Court of Appeals. Such a differential imposition of procedural requirements violates both the Commerce Clause and the Privileges and Immunities Clause. Pet. 21-23. Respondent observes that the Conaty defendants "submitted to detailed discovery of their assets" and "agreed not to dissipate their assets and agreed to have liens placed upon them pending appeal." Opp. 20-21. As the *quid pro quo* for those agreements, however, the judgment against the Conaty defendants was stayed pending appeal. Petitioner has never sought such a stay, and therefore the comparison respondent seeks to draw is false. In any event, respondent was accorded discovery and has encumbered petitioner's assets to the extent permitted under the laws of the States in which those assets are located.

3. This petition presents a question of personal jurisdiction on which there is a clear conflict of authority. Based on the identical evidence, two state courts reached directly conflicting decisions in this case: The West Virginia court concluded that petitioner's Yellow Pages advertisement was sufficient to create personal jurisdiction in West Virginia, while a California trial court held that the West Virginia courts had no jurisdiction over petitioner as a result of that advertisement.

Pet. 25.[5] These conflicting results are part of a larger pattern of contradictory decisions regarding whether a single advertisement can confer personal jurisdiction. Pet. 26-27 & n.11. Respondent attempts to trivialize the conflict on the ground that the cases cited by petitioner "all represent application of specific facts to the established law." Opp. 26. The law, however, is *not* established as regards the intersection of professional advertising and personal jurisdiction, and "[a]ttorneys and others are entitled to know whether advertising, in and of itself and with no causal connection with plaintiff's cause of action in a distant forum, can constitutionally subject them" to the exercise of personal jurisdiction by the courts of that State. Brief *Amicus Curiae* of the Academy of California Adoption Lawyers in Support of Petitioner 4.

4. Respondent argues that there is no need to remand the punitive damages award for consideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). *See* Opp. 26-28. Respondent entirely ignores the fact that the West Virginia courts have *never* had the opportunity to consider the award under the constitutional standards set forth in *BMW*. Petitioner has demonstrated that there are substantial grounds for reversal or reduction of the punitive damages award against him under *BMW*. Pet. 27-29. Although respondent attempts to argue the merits of the *BMW* issues in his opposition, this Court is not the fo-

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[5] Respondent asserts that he "never based his claim of jurisdiction over Mr. Leavitt solely on the yellow page ad." Opp. 21. Whatever other arguments respondent may have made are immaterial, however, because the West Virginia court found personal jurisdiction based on that advertisement. *See* Tr. 2869 ("THE COURT: . . . [I]t was my decision that was based on the fact that he advertised in the 1991 yellow pages").

rum in which to litigate these issues in the first instance. Rather, petitioner merely seeks a remand to the state courts for due consideration in light of the applicable standards, as this Court has done a number of times since *BMW* was announced. *See* Pet. 29.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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